In the

Supreme Court of the United States

October Term, 1906.

No. 464.

DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

HOSEA B. MOULTON, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff below sued the District of Columbia in an action on the case, claiming damages for personal injuries sustained by him November 26, 1896, on Park street, alleging in his declaration that it was the duty of the District to keep said street free from obstructions likely to scare or frighten reasonably gentle horses passing and repassing on said street; that while he was carefully driving such a horse attached to a carriage his horse became frightened and was made unmanageable and ungovernable by a certain steam roller, negligently and improperly suffered and permitted by the District to remain in Park street for the space of two days, so as to be a public nuisance and dangerous to travelers on said street with their carriages and horses; that his carriage, without fault of his own, was upset and he was thrown violently out upon the ground and seriously and permanently injured and prevented to a great extent from transacting his lawful affairs and practicing his profession as a lawyer.

Upon the trial of the case there was a verdict for the plaintiff of $6,450; the defendant's motion for a new trial was overruled and judgment entered on the verdict (Record 7); the case was carried on bills of exception (9) to the Court of Appeals, District of Columbia, where the judgment was affirmed (15 App. D. C. 363), hence the present writ of error.

STATEMENT OF THE CASE.

Park street is not one of the streets of the city of Washington. It lies some distance north of the city limits, in what was formerly known as the County.

Park street runs east and west and it is forty feet wide from building line to building line; its roadway is twenty-eight feet. Pine street runs north and south and is fifty feet wide; it was not macadamized or graveled, but it was traveled by teams (9); this street is nine hundred and thirty-six feet west of Fourteenth street.

The steam roller (14) was the kind usually used in constructing macadamized gravel roads. It had three wheels, the tread of the rear wheel being about eight feet, which was its extreme width; it was about eight feet long and about five or six feet high. The smokestack was a little higher than the other part of the machine. It was at rest, without fire or steam in it.

Location of the Roller at the Time of the Accident.

Cole (9), "The roller was on the south side of the roadway of Park street, about as close as it could be driven to the sidewalk." Emmerich (13), "It stood about fifty feet west of Pine street." Jennings (15):

> "It was standing on Park street, about sixty feet west of the place of the accident, and about twenty or thirty feet west of Pine street. Repairs had been going on in the roadway of Park street for about a

week or so, and the roller had not been there all the time, but had been brought there off and on."

Some of the plaintiff's witnesses testified that the roller was covered with white canvas—Cole (9), Moulton (10), Mrs. Turnburke (11)—that there was no covered canvas on the roller is established by the testimony of Jennings (15) and Policeman Jett (16).

Length of Time the Roller Had Been Standing in the Street.

There was a conflict of testimony as to the length of time the roller had been standing in Park street. The plaintiff's witnesses fixed the time as follows: Cole (9), "It had been on that street for several days prior to that time. They were resurfacing the street with macadam." He had seen the roller in that position there from at least one to three days. He had driven by it two mornings. Whenever he saw the roller it was at rest and in about the same position as at the time of the accident. Sarah Woodland, a servant employed by Mrs. Miller at her house on the southeast corner of Pine and Park streets (13):

> "They had been using this roller there all the week; they would bring it there and use it a while and take it away and bring it back; they brought it back on Wednesday morning, when it broke down; could not tell what time it was it broke down; they took it away Thanksgiving evening."

Emmerich (13) observed the roller in Park street on Thanksgiving Day and part of the day previous. Witnesses for the defendant, Thomas, engineer of the roller and in charge of it (14), testified that the roller had only been on Park street since 10 o'clock on the morning of the accident; that the machine had been there on the previous day, but had been taken and used on Yale street and Harvard street, where it had remained over night and had

been brought back to Park street on Thanksgiving Day and had only been there an hour when it broke down. Witness placed it as near the curb as possible and left it in that condition. Calhoun (15), foreman for the District in the Street Service Department, testified that the roller was under his charge on the day of the accident and broke down on that day; when it broke down he left it in charge of Goheens, the watchman, with instructions to warn people in order to prevent danger to those who drove by there; on the day of the accident he had orders to send the roller up to Park street. Collins (15), in charge of repairs on Park street, testified he thought the roller had been brought to Park street only on the morning of the accident. Jett, policeman (16), testified there was a man in charge of the roller; that the roller never remained in Park street over night to his knowledge. Goheens, a watchman, watching the steam roller (16): "It had just been brought there that day about 4 o'clock and broke down about 4.10 o'clock, about an hour prior to the accident; it was about a foot and a half from the curb on the south side."

The Roller Was in Full Sight of the Plaintiff, and He Unnecessarily and Recklessly Insisted on Driving Past it.

Plaintiff testified (10) that about 3 o'clock he drove out Fourteenth street to Park street and turned into that street going west; that he saw in front of him a steam roller of unusually large size; there was something thrown over a portion of it; that he had handled the horse he was driving for years and in his judgment it was as safe and as good a carriage horse as could be had; that he had driven by steam rollers when they were in motion with this horse time and time again when they had steam up; that as he approached this machine his horse pricked up his ears as a horse naturally would, but plaintiff did not discover *that his horse was*

unmanageable until he approached the lines of the intersecting streets; that when he reached the east line of Pine street for some reason the horse there seemed in a moment or two to become *intensely frightened,* either because of the flapping of the canvas on the roller or from some other cause; that he was guiding his horse between the roller and the curb to the right going west, and when he got up, just perhaps in about the middle of Pine street, his horse *became unmanageable* and reared on his hind feet; that he then saw his horse was badly frightened and that he could not go by the machine; that there was then but one thing to do, but the horse did not give him any chance to go back or turn and go down Pine street; he was rearing and backing; he rushed back and seemed to swing around; that the machine was about fifty feet west of Pine street on Park street; that on the north side of Pine street between the machine and the sidewalk there was sufficient space to drive by ordinarily, about ten or twelve feet (10) his wife said to him, "I think you had better turn back." Mrs. Turnburke, the plaintiff's sister in law (11) was on the back seat of the carriage at the time of the accident. They drove out Fourteenth street and turned into Park street and went along pleasantly; that in driving down Park street witness saw a steam roller about in the middle of the street; as they approached the roller the horse became very much frightened and seemed unmanageable, and just at that moment it seemed that Mr. Moulton would lose control of it. He tried to control the horse that seemed so terribly frightened; the wind blowing the canvass on the steam roller frightened the horse; the horse seemed to become unmanageable; but as he drove on he tried to control it; he spoke gently to it; he tried to turn and the horse reared and plunged, and in turning they went over. They had reached Pine street when the horse first showed symptoms of fright; the horse was terribly frightened in the beginning; plaintiff did not strike the horse with a whip, but tried to urge him by; that up to

the time the horse plunged and turned around plaintiff did not make any effort to turn down Pine street or to go back. J. J. Van Vleit (12) was riding a bicycle on Park street in the rear of the plaintiff's carriage; that plaintiff was in such a position with reference to the roller as to have seen it; plaintiff could not have gone over 10 or 15 feet toward the roller after the horse first showed fright; plaintiff did not use any more than ordinary force to go after he found his horse was frightened; that he attempted to turn to the left, but the horse at that time was in an unmanageable state and reared and plunged right back, and as he did so the accident occurred. Mrs. Van Vleit (12) was riding her bicycle on Park street in the rear of plaintiff's carriage; plaintiff's horse was proceeding quietly until he got within a short distance of the roller, about 50 feet, when the horse seemed as though he was frightened and did not care to go by, and with that reared on his hind legs and seemed to have a tendency to go backward; with that there was a crash and the wheel was dished under the buggy. Mrs. Saunders, the plaintiff's mother in law (14), was in the carriage at the time of the accident; the horse became very unmanageable, backing and plunging, and the next she knew they were turned over; the carriage only went a short distance after the horse showed signs of fright, and Mr. Moulton tried then to soothe and keep him quiet; plaintiff did not try to go by. The defendant's witnesses (15), Jennings was on Park street coming up from Fourteenth street, and was about one hundred and fifty or two hundred feet behind the plaintiff's carriage at the time of accident; plaintiff's carriage passed him about two hundred and fifty feet before it came to the place of accident; the steam roller was standing on Park street about sixty feet west of the place of the accident and about twenty or thirty feet west of Pine street. Improvements or repairs of the roadway of Park street had been going on for a week or so; the roller had been there off and on, not there all the time;

as far as he knew it had never remained there over night; he first saw the plaintiff's horse shy about forty or fifty feet east of Pine street and then go about the length of the courtroom; it looked as if the plaintiff was coaxing his horse on, but he could not say that plaintiff did any urging or whipped the horse. He saw the plaintiff turn his horse as if to go into Pine street, not to go into Pine street, but that way. At that time the horse was backing, and in backing the vehicle turned over; the roller could have been seen in the street as far east as Fourteenth street and a distance of from six to eight hundred feet; the plaintiff's horse went a little distance toward the roller when he first shied; there was no cover on the roller, as far as he knew. John Robinson (16) was a District laborer, and on Thanksgiving Day, the day of the accident, he came down Princeton street to go to Park street, and when he got there he met a gentleman driving up with a black horse with three ladies in the carriage; it was near about 5 o'clock; he saw the watchman there in charge of the roller; plaintiff came up with his horse and carriage and the horse got more frightened the closer he got to the steam roller; plaintiff bore the reins down on the horse and kept driving toward the machine; the horse stopped three times; after the horse came to such a distance he looked around and saw the machine again, and then the watchman went and seized the horse; witness heard him say nothing and the gentleman shook his head and told him to let him go, and the horse turned and sawed and reared and turned the carriage over; the horse was not badly frightened until he suddenly turned around; witness ran to the carriage and lifted it up; plaintiff's horse was about one hundred yards east of Pine street when he shied, but the gentleman pulled him in and wanted him to go by the roller, but the horse did not want to go that way, and in turning it broke the wheel down; Frank Goheens (16) was watching the steam roller on

Park street; it had broken down in the afternoon about an hour prior to the accident; it broke down about fifty feet from Pine street; witness got to Park street with the roller at 3 o'clock, when it broke down; they drove it up as close as they could to the curb and left it about a foot and a half from the curb of the south side. At the time of the accident to the plaintiff he was standing right by the engine and noticed the plaintiff's carriage coming from the other side of Pine street and offered to assist him by the roller, walking up to the other side of the street and offering to put his hands on the reins of the horse, but the plaintiff said, "No, I will drive this horse; I guess I am capable of driving it." Witness said, "All right," and walked back and stood with his back up against the boiler of the engine. The horse then turned right around and threw the plaintiff out. When witness first noticed the plaintiff's carriage it was on the east side of Pine street, about sixty feet, and the plaintiff had plenty of room to go around after witness offered his assistance, which was declined. Plaintiff did not do anything except to take the reins in both hands and hit the horse and say, "I will drive this horse by there," and just as he did that the horse took a short turn and threw them out; when witness went to the assistance of the plaintiff the horse was just pricking its ears and looking at the roller; there was no steam or fire in the roller. Plaintiff and his witnesses testified that no watchman took hold of plaintiff's horse or gave him warning in reference to the roller.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred in sustaining and affirming the action of the trial court—

1. In granting the plaintiff's first prayer (17), and in refusing to grant the defendant's first prayer (20), ninth prayer

(19), tenth prayer (19), eleventh prayer, twelfth, thirteenth and fourteenth prayers (20), because the presence of the steam roller in Pine street was not an actionable obstruction thereof; and no action will lie against the District of Columbia for injuries resulting from the frightening of a horse by a steam roller at rest in its streets, and because the plaintiff was guilty of contributory negligence.

2. In granting the plaintiff's second prayer (17), because the same was misleading and does not correctly state the doctrine of contributory negligence.

3. In rejecting defendant's seventh prayer (19), because the question of reasonable time under the circumstances was a question of law.

4. In rejecting defendant's eighth prayer (19), because the object of a warning, sign or barrier is to give notice, and actual knowledge accomplishes that object and supersedes the necessity for such notice; and in instructing the jury (parts of charge in brackets) that it was (25) for them to consider whether the plaintiff was not authorized to believe that the defendant would have sufficient protection in the neighborhood of the roller to avert all dangers, and that if the roller was left in the street without having someone to give warning of it by night and by day that they would be justified in finding that that was actionable negligence.

I.

The Presence of the Steam Roller in Park Street was Not an Actionable Obstruction Thereof.

Park street was not out of repair; it was being improved; but it was entirely safe for travel. The steam roller standing close to the curb on the south side of the street was not an obstruction in Park street. There was ample space to drive on Park street. The plaintiff knew this. He says:

"There was sufficient space to drive by ordinarily, about ten or twelve feet."

A city has the right to use any proper implement, even run by steam, for the purpose of constructing or repairing its streets, and, in the absence of carelessness or negligence in its management, it is not liable for damages occasioned by a horse becoming frightened thereat.

Sparr *vs.* St. Louis, 4 Mo. App. 572.
Macomber *vs.* Nichols, 34 Mich. 212 (Cooley, J.).

The steam roller was not *per se* an object calculated to frighten horses of ordinary gentleness. Judicial notice will be taken of whether an object is of that character. The question is not a question for the jury; for example, a box freight car standing still at a highway crossing has been held, as matter of law, not of itself a frightful object to horses of ordinary gentleness.

Gilbert *vs.* Flint, etc., Railway Co., 51 Mich. 488.

It has been held that a large vehicle used as a daguerrean saloon standing partly within the limits of a highway, but outside of and several feet from the traveled path, is not a defect in the highway, which will entitle a traveler to recover against a town damages for the injuries sustained by him if his horse, while driven by himself, is frightened thereby, and becomes unmanageable and runs for some distance and upon an embankment, so that the carriage is broken and himself thrown upon the ground and injured.

Keith *v.* Easton, 2 Allen, 552.

The body of a common riding wagon turned up on edge at the side of the road can not be regarded as so likely to frighten horses as to render the town liable for damages done by a horse frightened at it in case it is permitted to remain there. Horses are accustomed to pass such buggies

many times daily when traveling the highways, and to see them at home.

> "Be sure, the horse was alarmed by its appearance. But the same horse might as well be terrified by suddenly seeing some rocks or bushes by the roadside, or be alarmed at a woodpile, a manure heap, a hay rack, a cart, a wheelbarrow, a guideboard, a telegraph pole or something else of the numberless inanimate things necessarily seen near or upon our streets and highways. All the eccentricities of sensitive horses can not be guarded against by towns. The slightest objects will sometimes frighten them. A bright chip, a bit of paper in motion, or an umbrella, or even a shadow, will terrify some horses. But many such incumbrances there are upon our roads that can not be considered defects. There must be a sensible and practical limitation of the municipal responsibility. Towns are not to be regarded as insurers. The truth is, that in many of this class of cases, more fault should be charged upon the horse and his driver, and less upon the town. It is an easy thing for witnesses to bolster up the character of horses for gentleness, and to swear to careful driving, where it is a point to be proved by opinion. But, at all events, we are not satisfied that it should reasonably be expected by the town, that the wagon body, situated as it was, would naturally have the effect to frighten 'an ordinarily kind, gentle and safe animal, well broken for traveling upon our public roads.'"
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> Nichols *vs.* Athens, 66 Me. 402.
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> Kumbo *vs.* Gilham, 103 Wis. 312.

The liability, if any, arises out of the fact that obstructions are permitted to be there for an *unlawful* purpose.

Cairncross *vs.* Pewaukee, 78 Wis. 66.

A stream of water thrown into a street by a fireman is not a defect within the meaning of the highway law.

Edgerly *vs.* Concord, 59 N. H. 78.

In Piollet *vs.* Simmers, 106 Penna. St. 95, it was said that the liability would attach if the objects were "calculated to frighten ordinary gentle and well trained horses."

> "For, if persons are bound to guard against frightening skittish, vicious, timid and easily frightened horses, it will not be possible to state any limit of precaution which will be a protection against liability." And the court quoted from Pittsburg, etc., Rwy. Co. *vs.* Taylor, 104 Penna. St. 306:
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> "The frightening of a horse is a thing which can not be anticipated, and is governed by no known rules. A leaf, a piece of paper, a lady's shawl fluttering in the wind, a stone or a stump by the wayside, will sometimes alarm even a quiet horse."

THE PLAINTIFF'S CARRIAGE DID NOT COME IN CONTACT WITH THE STEAM ROLLER; HIS HORSE WAS FRIGHTENED BY ITS PRESENCE. THE STREET WAS NOT OUT OF REPAIR WHERE HE WAS INJURED.

If the horse of a traveler becomes frightened at an object in the highway which is an obstruction and defect therein, and with which, but for his fright, he would have come in contact, and by reason of such fright, without coming in contact with it, runs away and overturns the carriage at a place where there is no defect, the city or town is not liable for injury so sustained by the traveler.

Cook *vs.* Charlestown, 98 Mass. 80.

An object in a highway with which a traveler does not come in contact or collision, and which is not an incumbrance or obstruction in the way of travel, is not to be deemed a defect for the reason that its bright appearance causes a horse to take fright, in consequence of which he momentarily escapes from the control of his driver and causes damage.

Cook *vs.* Montague, 115 Mass. 571.

A statute making a municipality liable for an injury that is due to a street's being out of repair applies only where the want of repair is the immediate cause of the injury, and it is not putting a highway out of repair to let things stand in it for a time that form no part of it. So *held* where a horse was frightened at the sight of a boulder that had been dug out of the roadbed and left between the gutter and the traveled part of the way until it could be removed by a person who had asked for and obtained it for building purposes.

Agnew *vs.* City of Corunna, 55 Mich. 428.

A telephone company, in laying wires underground under a city ordnance granting permission to occupy the portions of the streets of the city necessary for that purpose, obstructed a part of the street, leaving open for travel a space of about seven and a half feet between a manhole and the curbing. The cap of the manhole was partly removed so as to extend into this open space. An experienced driver, with full knowledge of the surroundings, used this route, when he might have used another, and in so doing his horse became frightened and shied, throwing him from the wagon to the street, causing his death. *Held* that decedent assumed the risk and that there can be no recovery for his death.

Cain's Admr. *vs.* Ohio Val. Tel. Co., 47 S. W. Rep. (Ky.) 754.

A county is not liable for an injury sustained by one, before entering upon a bridge, by a team becoming frightened at its defective condition, although it has been out of repair so long as to charge the county with notice.

Board of Comms., etc., *vs.* Rickel, 106 Ind. 501.

When a horse, while being driven with due care upon a highway which a town is bound to keep in repair, becomes, by reason of fright, disease or viciousness, actually uncontrollable, so that his driver can not stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway by which an injury is occasioned, the town is not liable for the injury unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable in this sense if he merely shies or starts or is momentarily not controlled by his driver. City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public, and where at the point of the accident the street was abundantly wide and well repaired to enable persons, with the exercise of ordinary care to avoid the injury, the city will not be responsible merely from the existence of a defect in the untraveled portion of the street.

Titus *vs.* Northbridge, 97 Mass. 258.
Approved in Brown *vs.* Mayor, 57 Mo. 156.
Kingsbury *vs.* Dedham, 13 Allen, 186.
Perkins *vs.* Fayette, 68 Me. 152.

Vide also the dissenting opinion of Carpenter, Justice, in Young *vs.* New Haven, 39 Conn. at 442.

And also the dissenting opinion of Adams, Chief Justice, in Stanley *vs.* Davenport, 54 Iowa, 463.

There is an apparent conflict of authority upon the subject of liability in such a case as the present, but we insist that twentieth century civilization has passed beyond the era of the horse, and in the interest of progress his erstwhile rights upon the highway must be substantially abridged or modified. Steam and electricity have supplanted him in

the field of serviceable use, and in consequence he has become a back chapter.

The municipality should not be held liable in this case for an injury occasioned by plaintiff's horse taking fright at a *steam roller, a highly useful machine, which was being* used by the District from day to day, in the construction and repair of Park street, at and near the place where the accident happened, and which had been disabled only the day before.

Considerations of public policy, and the spirit of progress and improvement characterizing the present age, should encourage and not deter the use, constant or intermittent, of a machine which is such a great advance over old methods and appliances.

Steam fire engines are highly calculated to frighten horses, yet their use upon the highway must be considered permissible and proper; and if, while one of these engines is in operation, or on its way to a fire, a horse should become frightened at it, and injury result, an action for damages would not lie.

Numberless appliances of modern civilization, calculatad to frighten horses, are found upon the streets and highways, but their use is not necessarily to be forbidden for that reason. Private convenience must often yield to paramount public covenience.

The law should and does keep step with progress; the allowable things of today are in many instances the things which were reprobated yesterday. How long is the horse to maintain his empire after he has lost his relative place of usefulness and necessity?

In this jurisdiction it is settled law, that the municipality has the right to use its streets for the purpose of municipal constructions, and to employ the best adapted means and appliances for the execution of the work of the improve-

ment, and while such improvements are in course of construction, persons using the streets must take notice of the work and in their use of the street must exercise their ordinary powers of observation, and not recklessly or unnecessarily incur risk, and where the nature or condition of the work and the implements employed therein obviously require care on the part of those using the streets, *special care and caution* may reasonably be insisted upon in order to avoid the risk of accident, and if a party *recklessly* or *needlessly* incurs risk of danger and suffers thereby he can have no remedy as against the municipality. The only restriction upon the exercise of the municipality through and over the streets in making public improvements therein is that the work shall be done in a proper and reasonably careful manner to avoid injury, and that the means and instruments employed in doing the work shall be reasonably adapted to the accomplishment of the undertaking and not be of an unnecessarily dangerous character.

Dist. of Col. *vs.* Ashton, 14 App. D. C. 571.

One can not assume a position of danger and then complain of injury from negligence which could cause no injury except to one in that dangerous position.

RR. Co. *vs.* Jones, 95 U. S. 439.
RR. Co. *vs.* Houston, 95 U. S. 697.
Schofield *vs.* RR. Co., 114 U. S. 615.

Plaintiff is guilty of contributory negligence which disentitles him from recovery where he has knowledge of the dangerous condition of a street and pursues his course thereon in preference to taking another street, which he could have done with safety, although with inconvenience.

Dist. of Col. *vs.* Brewer, 7 App. D. C. 113.

The plaintiff can no more recover in this case than one

who, knowing the defective condition of a sidewalk, ventures upon it without taking the precaution necessary to prevent a fall.

Aurora *vs.* Brown, 11 Ill. App. 422.
Mayhew *vs.* Burns (Ind.), 2 N. E. R. 793.
Erie *vs.* Magill, 101 Pa. St. 616.
Schaefler *vs.* Sandusky, 33 Ohio St. 246.
Wilson *vs.* Charlestown, 8 Allen, 137.
Parkhill *vs.* Brighton, 61 Iowa, 103.
Cook *vs.* Johnson, 58 Mich. 437.
Black *vs.* Manistee, 107 Mich. 60.
Grandorf *vs.* District, etc., 113 Mich. 496.

The Plaintiff Was Guilty of Contributory Negligence.

The defendant was put by the trial court at great disadvantage before the jury in respect to the doctrine of contributory negligence. We were practically deprived of the benefit of the doctrine in its application to the case at bar. It is true the court granted our instructions on the subject, but it took occasion in the same breath (26) to discredit the doctrine as a principle of law. The court should have directed a verdict for the defendant because of the plaintiff's contributory negligence. It is plain from his own testimony and that of his witnesses that he was reckless in undertaking unnecessarily to drive by the roller.

His sister in law, Mrs. Turnburke, who was in the carriage with him, testified (11) that—

> "as they approached the roller the horse became *very much frightened* and seemed unmanageable, and just at that moment it seemed that Mr. Moulton would lose control of it. He tried to control the horse that seemed so *terribly frightened*; the wind blowing the canvass on the steam roller frightened the horse; the horse seemed to become unmanageable, but as he drove on he tried to control it; he spoke gently to it; he tried to turn and the horse reared and pluuged, and in turning they went over. *They had*

not reached Pine street when the horse first showed symptoms of fright; the horse was *terribly frightened in the beginning.*"

By this witness, therefore, the plaintiff showed that his horse did not become frightened and unmanageable at the moment, but some considerable time prior thereto, and at a place quite distant from, the place of accident; and at a time when and at a place where he could have dismounted and controlled his horse, or turned back in the way he had come, or turned to the left and gone safely down Pine street. It is to be remembered that Pine street was fifty feet wide; and this witness states that the horse was *terribly frightened in the beginning*, and became *very much frightened and seemed to become unmanageable*, but yet plaintiff persisted in his efforts to drive on.

The testimony of the plaintiff himself is to the same effect. He did not discover that his horse was unmanageable (10) "until he *approached* the lines of the intersecting street" (meaning Park street, on which he was driving, and Pine street, running at right angles to it)—so that his horse, which had become frightened before that, had actually become unmanageable when he was more than one hundred feet from the roller, and not, as he afterwards stated, "when he got up, just perhaps in about the middle of Pine street;" he stated also that his horse seemed to become *intensely frightened* when he reached the east line of Pine street. There is but one view that can be reasonably taken of all this; it is that the plaintiff knew in time to have avoided this accident that his horse would not pass the roller; that he could have escaped injury, but that he chose to take the risk, relying upon his supposed skill as a driver and mastery over his horse, which "he had driven by steam rollers when they were in motion time and time again when they had steamed up." The defendant's witness Robinson (16) stated that plaintiff's horse shied when about one hundred

yards from Pine street; and this witness and Goheens (16) testify that the plaintiff insisted on driving past the roller.

The language of the Court of Appeals of the District of Columbia in another case seems quite appropriate here; in that case the court denied the liability of the municipality. It said:

> "Upon reading the evidence, the first question that naturally suggests itself is, why should the buggy have been driven into a place of danger, with full knowledge of the risk, and that it required very neat driving to go through the space between the excavations, according to the evidence of the driver of the buggy? It is true, everyone has a right to travel the street; but it is an established principle, that a party who ventures to pass a dangerous defect or obstruction in a street or highway, knowing its condition, is bound to exercise a degree of care proportionate to the danger. . . . The shying of the horse seems to have been the immediate cause of the accident; but what caused the horse to shy is matter of pure conjecture. The buggy was overturned by being run upon one of the piles of earth, and that was caused by the shying of the horse from the regular course or way. It was the upsetting of the buggy, and throwing out the plaintiff that produced the injury complained of. To entitle the plaintiff to recover for this injury, it must be shown that the alleged negligent defect in the street, if defect were shown to exist, was the sole cause of the injury. Where the injury follows from a defect united with some distinct, efficient cause, without which it would not have happened, the plaintiff can not recover."
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> Swart *vs.* D. C., 29 Wash. Law Rep. 138.

II.

The Doctrine of Contributory Negligence was Not Correctly Declared.

The court erred in granting the plaintiff's second prayer (17), because the same was misleading and does not correctly state the doctrine of contributory negligence.

Said prayer is fatally erroneous in that it assumes a state of facts which was not proven; there was no proof that the plaintiff's horse "became unmanageable the moment or almost immediately before the accident occurred"; as we have already shown, the testimony of the plaintiff himself and of his sister in law (Mrs. Turnburke) establishes the fact that the horse was "terribly frightened in the beginning," "very much frightened," and "seemed unmanageable" quite a considerable time prior to the accident and before he had reached Pine street, and when and where plaintiff could have avoided the accident if he had not been intent on dominating his horse and forcing him to drive past the roller.

Under the circumstances of this case, the court should have instructed the jury that the plaintiff was required to exercise special care and caution in order to avoid the risk of accident.

Dist. Col. *vs.* Ashton, *supra.*
Jacob *vs.* Bangor, 16 Me. 190.

III.

Reasonable Time of the Roller's Occupation of the Street was a Question of Law.

The court erred in rejecting the defendant's seventh prayer (19), because the question of reasonable time under the circumstances of this case was a question of law.

The prayer was addressed to the question of the length of time which defendant might allow the steam roller to remain on Park street without rendering itself liable to the charge of negligence. This was a question of law, and the court should not have left it to the jury.

Wiggins *vs.* Burkham, 10 Wall. 129.
Nunez *vs.* Dauntel, 19 Wall. 560.
19 A. & E. Ency. Law, 640.

IV.

Actual Knowledge on the part of the Plaintiff of the Presence of the Roller in Park Street Rendered Unnecessary any Warning, Sign or Barricade; and the Court Erred in Holding that the Municipality was Liable unless it had "Some one to Give Warning of this Roller by Night and by Day."

The trial court erred in refusing to grant the eighth prayer (19) of the defendant:

> "If the jury believe from the evidence that the plaintiff saw the steam roller in Park street in time by the exercise of reasonable care, to have avoided the accident, then it is immaterial whether the defendant displayed any warning sign to indicate the presence of the roller, or whether the street was barricaded so as to prevent travel over it at the point where the roller stood."

The proof was full and uncontradicted on the subject; the plaintiff as well as the defendant proved that the roller was in full sight from Fourteenth street, a distance of over nine hundred feet. The plaintiff knew it was there; and he found out that his horse was frightened at it long before he reached Pine street.

In a case of the use of a steam roller, very similar to the case at bar, it was held that there can be no liability on the part of a city or town for using the means necessary and proper for carrying out its duty in making streets or highways safe and convenient, when notice of such use has been brought home to the traveler before an injury has occurred in consequence of such use. The notice of use which it is the duty of the city or town to give the traveler is sufficient when the traveler sees and apprehends the danger in season to avoid it. Such knowledge on the part of the traveler is

notice to himself, for no one needs notice of what he already knows.

Lane *vs.* City of Lewiston, 91 Me. 292.

But perhaps the defendant was not damnified by the refusal to grant this prayer so much as it was by the court's deliberate instruction on the subject in his charge to the jury. The court told the jury that (25)—

> "it was for them to consider whether the plaintiff was not authorized to believe that the defendant would have *sufficient protection* in the neighborhood of this roller to *avert all danger.*"

The jury was thus practically instructed that the municipality was bound to insure the absolute safety of the traveller on the streets because it was its duty to *avert all dangers* by means of "*sufficient protection.*" This was plainly erroneous and it was inconsistent with and nullified the third prayer of the defendant (18) which was granted by consent. Not content with this declaration as the law of the case, the court then proceeded to place the matter beyond question and possibility of misunderstanding, saying (25):

> "But if they (the municipality) left it (the roller) there without having some one to give warning of it *by night* and *by day* you would be justified in finding that *that* was *negligence* if it was such an affair as would cause fright to be given to horses passing there."

There was no proof that there was a lantern displayed or that there was a watchman there on the preceding night, after the roller broke down; and of course the jury, therefore, had no other alternative than to follow the express direction of the court and find culpable negligence on the part of the defendant, and to assess the damages.

And yet this is a case in which the court below affirmed the trial court, declaring in its opinion (32):

> "It is only where there is a plain and obvious neglect of duty on the part of the municipality's agents that liability can arise in such cases as the present."

On the whole case it is respectfully submitted that the trial court should have directed a verdict for the defendant, and the judgment entered should be here reversed.

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